This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0396

Reichel Foods, Inc.,
Respondent,

Stowaway Storage, LLC, et al.,
Defendants,

vs.

Loretta Lynn Taylor,
Appellant.

Filed August 26, 2024
Affirmed
Johnson, Judge

Olmsted County District Court
File No. 55-CV-23-705

David L. Liebow, James A. Godwin, Godwin Dold, Rochester, Minnesota (for respondent)

Amy S. Conners, Brian J. Linnerooth, Allison L. Dohnalek, Best & Flanagan, L.L.P., Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Segal, Chief Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Loretta Lynn Taylor was employed by Reichel Foods Inc. from 2002 until 2021, when she resigned her position. She later was charged with theft by swindle and aiding and abetting theft by swindle based on allegations that she misappropriated money from her employer. While the criminal case was pending, Taylor requested that the company advance her money to pay the costs of her defense as she incurred them, before a final determination of her entitlement to indemnification by the company. Reichel Foods denied her request. Taylor later filed a motion in this civil case for a court order requiring Reichel Foods to advance her the money she requested. The district court denied Taylor's motion, in part because she had signed a petition to plead guilty to theft by swindle. We conclude that the district court did not err by denying Taylor's motion. Therefore, we affirm.

FACTS

We recite the relevant facts based on the record before this court, which is relatively sparse because it includes only the documents that the parties filed in this civil case, not the documents filed in the criminal case.

Taylor began working for Reichel Foods, which is located in the city of Rochester, in 2002. She was promoted to the position of controller in 2011. In that position, she was "responsible for helping to manage payroll, prepare financial statements, review and approve expenses, and prepare tax filings."

Taylor resigned her employment with Reichel Foods in July 2021. Ten months later, in May 2022, the state charged her with one count of aiding and abetting theft by swindle. According to Taylor's appellate brief, the state alleged that she misappropriated approximately $740,000 from the company.

In September 2022, four months after the criminal charge was filed, Taylor's attorney sent a letter to Reichel Foods's attorney seeking an advance payment of money so that she could pay expenses for which she later might be entitled to indemnification under the Minnesota Business Corporation Act. *See* Minn. Stat. § 302A.521 (2022). Reichel Foods's attorney responded by requesting that Taylor personally execute an affidavit attesting to facts that satisfy the statutory requirements. Taylor did not immediately respond.

In mid-November 2022, Reichel Foods's attorney sent a follow-up letter to Taylor's attorney. The letter stated that Reichel Foods had not received the requested affidavit and that the company was denying Taylor's request for an advance because the company had determined that she cannot satisfy the statutory requirements for such a payment. In late November 2022, Taylor's attorney sent Reichel Foods's attorney an affidavit that Taylor had executed in early October 2022 in which she made statements relevant to the statutory criteria.

In December 2022, Reichel Foods commenced this civil action against Taylor, Taylor's husband, the former chief financial officer (CFO) of the company, and members of the former CFO's family. Reichel Foods asserted seven claims against the defendants, including claims against Taylor of breach of fiduciary duty, unjust enrichment, civil conspiracy, conversion, and civil theft. Reichel Foods alleged in its complaint that Taylor misappropriated money from Reichel Foods by using its credit cards and credit-card rewards for personal purposes without proper authorization and by wrongfully obtaining reimbursements of cell-phone expenses that she did not actually incur. Taylor answered the complaint in January by denying the allegations and asserting a counterclaim for indemnification pursuant to Minnesota Statutes section 181.970 (2022).

In August 2023, in the criminal case, the state amended the complaint by adding three counts of theft by swindle. According to Taylor's appellate brief, the state alleged that she misappropriated approximately $8,000 from the company in the form of improper cell-phone reimbursements.

In early October 2023, Taylor filed a motion in this case for a court order requiring Reichel Foods to pay her the advance that she had requested a year earlier. In late October 2023, while her motion for an advance was pending, Taylor signed a petition in the criminal case to plead guilty to three counts of theft by swindle in exchange for the state's voluntary dismissal of the charge of aiding and abetting theft by swindle. Three days after she signed the plea petition, Reichel Foods filed a memorandum in which it argued, among other things, that Taylor is not entitled to an advance because she had signed the plea petition.

The district court conducted a hearing on Taylor's motion in mid-November 2023. In late November 2023, Taylor entered guilty pleas to the three new counts of theft by swindle. Reichel Foods informed the district court of Taylor's guilty pleas by letter. In February 2024, the district court filed an order in which it denied Taylor's motion for an advance with respect to both the criminal case and this civil case. Taylor appeals.

DECISION

Taylor argues that the district court erred by denying her motion for an advance with respect to both her criminal case and this civil case.

The Minnesota Business Corporation Act provides for the indemnification of directors, officers, and employees of corporations who are "made or threatened to be made a party to a proceeding by reason of [their] former or present official capacity." Minn. Stat.

§ 302A.521, subds. 1(c), 2(a). Such a person is entitled to indemnification for "judgments, penalties, fines . . . , settlements, and reasonable expenses, including attorneys' fees and disbursements, incurred by the person in connection with the proceeding," so long as certain statutory requirements are satisfied. *Id.*, subd. 2(a).

To be eligible for indemnification with respect to a civil proceeding, a director, officer, or employee of a corporation must satisfy four criteria: the person must not have been "indemnified by another organization or employee benefit plan," must have "acted in good faith," must have "received no improper personal benefit," and must have "reasonably believed that the conduct was not opposed to the best interests of the corporation." *Id.*, subd. 2(a)(1)-(3), (5). To be eligible for indemnification with respect to a criminal proceeding, the person must satisfy the above-stated criteria and, in addition, must not have had "reasonable cause to believe the conduct was unlawful." *Id.*, subd. 2(a)(1)-(5).

Before an entitlement to indemnification is determined, a director, officer, or employee of a corporation may receive an advance payment of money for purposes of paying reasonable expenses incurred in connection with a civil or criminal proceeding. *Id.*, subd. 3. Our caselaw refers to this payment as an "indemnification advance" or "advancement" and describes it as "immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings." *Asian Women United v. Leiendecker*, 789 N.W.2d 688, 691 (Minn. App. 2010) (quotation omitted).

Specifically, a director, officer, or employee of a corporation who "is made or threatened to be made a party to a proceeding . . . is entitled, upon written request to the corporation, to payment or reimbursement by the corporation of reasonable expenses, including attorneys' fees and disbursements, incurred by the person in advance of the final disposition of the proceeding," subject to two conditions. Minn. Stat. § 302A.521, subd. 3. The first condition of advancement is that the person provide "the corporation . . . a written affirmation by the person of a good faith belief that the criteria for indemnification set forth in subdivision 2 have been satisfied and a written undertaking by the person to repay all amounts so paid or reimbursed by the corporation, if it is ultimately determined that the criteria for indemnification have not been satisfied." *Id.*, subd. 3(a). The second condition is that the corporation make "a determination that the facts then known . . . would not preclude indemnification." *Id.*, subd. 3(b).

If a corporation denies a request for advancement or does not respond within 60 days, the director, officer, or employee may seek a determination by a district court of the person's entitlement to advancement. *Id.*, subd. 6(a)(5); *Leiendecker*, 789 N.W.2d at 692-93. In that event, the district court must determine the person's entitlement to advancement based on the facts "then known to the district court." *Leiendecker*, 789 N.W.2d at 693. The person seeking advancement "has the burden of establishing that the person is entitled to" such payment. Minn. Stat. § 302A.521, subd. 6(a)(5). This court applies a *de novo* standard of review to a district court's determination of a person's right to advancement. *Leiendecker*, 789 N.W.2d at 690.

In this case, Taylor challenges the district court's determination that she is not entitled to advancement with respect to both her criminal case and this civil case. We separately consider her arguments with respect to each case.

A. Criminal Proceeding

Taylor first argues that the district court erred by determining that she is not entitled to advancement with respect to the criminal case.

In response, Reichel Foods initially argues that Taylor's request for advancement with respect to the criminal case is moot because the criminal case was concluded when Taylor pleaded guilty and was sentenced. A lawsuit, claim, or request for relief may be moot if "an award of effective relief is no longer possible." *State ex rel. Ford v. Schnell*, 933 N.W.2d 393, 401 (Minn. 2019) (quotation omitted). The advancement provision of the indemnification statute states that a person may seek advancement for "reasonable expenses . . . *incurred by the person in advance of the final disposition of the proceeding*." Minn. Stat. § 302A.521, subd. 3 (emphasis added). A person may choose to abandon a request for advancement after the final disposition of a proceeding and instead focus on obtaining indemnification, and we assume that most persons would do so. But the statute does not necessarily preclude a person from receiving advancement after the conclusion of a proceeding, so long as the expenses for which advancement is sought were *incurred* before the final disposition of the proceeding. Accordingly, it was possible for the district court in this case to have awarded effective relief to Taylor with respect to the expenses she incurred in the criminal case before final judgment was entered. Thus, Taylor's request for advancement with respect to the criminal case is not moot.

Reichel Foods argues in the alternative that Taylor is ineligible for advancement because she filed a petition to plead guilty, and later pleaded guilty, to three criminal charges. The district court agreed, relying on evidence submitted by Reichel Foods that Taylor had filed a plea petition that indicated her intention to plead guilty to three counts of theft by swindle. The district court reasoned that the offense of theft by swindle requires proof that a person intentionally engaged in a swindle and, as a result, obtained for herself the property of another. *See* Minn. Stat. § 609.52, subd. 2(a)(4) (2022). Given the evidence of Taylor's plea petition, the district court determined that the known facts would preclude Taylor from qualifying for indemnification by Reichel Foods, thus making her ineligible for advancement.

On appeal, Taylor initially contends that the district court erred on the ground that her petition to plead guilty, and her subsequent guilty pleas, are not dispositive. She cites a provision of the indemnification statute that states, "The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent does not, of itself, establish that the person did not meet the criteria" for indemnification. Minn. Stat. § 302A.521, subd. 2(b). But the district court did not rely solely on the fact that Taylor's criminal case was resolved by a settlement or that it resulted in a conviction. Rather, the district court considered the elements of the charged offense and determined that Taylor's stated intention to plead guilty to theft by swindle is necessarily inconsistent with two of the statutory criteria of indemnification: that she "received no improper personal benefit" and that she did not have "reasonable cause to believe the conduct was unlawful." *See* Minn. Stat. § 302A.521, subd. 2(a)(3)-(4).

The district court's analysis is correct. The crime of theft by swindle requires proof that a defendant had a specific intent to defraud. *State v. McNeilly*, 6 N.W.3d 161, 189 (Minn. 2024); *In re Disciplinary Action Against Bonner*, 896 N.W.2d 98, 111 (Minn. 2017); *State v. Pirsig*, 670 N.W.2d 610, 615 (Minn. App. 2003). By stating in a plea petition that she intended to plead guilty to theft by swindle, Taylor effectively negated the prior statements in her October 2022 affidavit that she had no "reasonable cause to believe the conduct was unlawful" and that she had "received no improper personal benefit." *See* Minn. Stat. § 302A.521, subd. 2(a)(3)-(4). Thus, the district court did not err by reasoning that, given the elements of the offense of theft by swindle, Taylor's plea petition precludes her from establishing two of the statutory criteria of indemnification, which makes her ineligible for advancement.

Taylor also contends that the district court erred on the ground that its decision is based only on written submissions and not on oral testimony. Taylor cites no authority for the proposition that the district court was required to conduct an evidentiary hearing before ruling on the motion. In any event, it does not appear that Taylor requested an evidentiary hearing. Rather, Taylor chose to submit only the affidavit that she executed in October 2022, one year before she signed her petition to plead guilty to theft by swindle. Even after Reichel Foods submitted evidence of Taylor's signed plea petition in its opposition to her motion, Taylor did not submit any additional evidence with her reply memorandum, such as an additional affidavit addressing the obvious conflicts between her October 2022 affidavit and the October 2023 plea petition. As the party seeking advancement, Taylor bore "the burden of establishing that [she] is entitled to" advancement. *See* Minn. Stat.

§ 302A.521, subd. 6(a)(5). Given the evidence submitted by the parties, the district court properly concluded that the known facts would preclude Taylor from being eligible for indemnification, which makes her ineligible for advancement with respect to the criminal case.

Thus, the district court did not err by denying Taylor's motion for advancement with respect to the criminal case.

B. Civil Proceeding

Taylor also argues that the district court erred by determining that she is not entitled to advancement with respect to the civil case.

The district court resolved this part of Taylor's motion by reasoning that Taylor's request for advancement with respect to the civil case was not properly before the court because she did not submit to Reichel Foods a proper request for advancement with respect to the civil case. Specifically, the district court reasoned that Taylor was not a party to a civil case when she executed her affidavit in October 2022 and when she sent it to Reichel Foods in November 2022 because Reichel Foods commenced this civil case against her later, in December 2022. The district court also reasoned that, when Taylor executed the October 2022 affidavit and requested advancement, there was no threatened civil case.

Taylor contends that the district court erred for three reasons. First, she contends that her affidavit sought advancement with respect to both the criminal case and the civil case because it referred to the then-pending criminal case "and all related matters." Her contention ignores the statute, which allows advancement only "if a person is made or threatened to be made a party to a proceeding." Minn. Stat. § 302A.521, subd. 3. When she executed her affidavit in October 2022 and sent it to Reichel Foods in November 2022, she was not "a person . . . made . . . a party" to any civil case. *See id.* She was, of course, a party to a civil case by the time her request for advancement came before the district court. But a district court's authority to determine a person's entitlement to advancement exists only if the corporation has denied the person's request or has not responded to a request within 60 days. Minn. Stat. § 302A.521, subd. 6(a)(5). Because Taylor did not request advancement from Reichel Foods at a time when she was a party to a civil case, the district court had no authority to determine her eligibility for advancement in the first instance.

Second, Taylor contends that, even if she was not a party to a civil case when she executed her October 2022 affidavit, she was a party to this civil case when she asserted her counterclaim in January 2023. But Taylor pleaded a counterclaim for indemnification, not advancement. In addition, her counterclaim is based on a different statute, Minnesota Statutes section 181.970. An employee is not entitled to indemnification pursuant to section 181.970 if she is entitled to indemnification pursuant to section 302A.521. Minn. Stat. § 181.970, subd. 2(3); *Schantzen v. Erdmann*, 4 N.W.3d 821, 825-27 (Minn. App. 2024), *rev. denied* (Minn. June 18, 2024). For that reason, an employee's allegation that she is entitled to indemnification under section 181.970 is, in effect, a statement that she is *not* entitled to indemnification under section 302A.521. Furthermore, Taylor's answer does not satisfy the conditions of advancement because it is not "a written affirmation" by Taylor herself (as opposed to an attorney) and because the answer does not contain "a written undertaking . . . to repay all amounts so paid or reimbursed by the corporation, if it is ultimately determined that the criteria for indemnification have not been satisfied." *See* Minn. Stat. § 302A.521, subd. 3. For all of these reasons, Taylor's counterclaim cannot be construed as a request for advancement pursuant to section 302A.251, subdivision 3.

Third, Taylor contends that, when she executed the October 2022 affidavit, she was "a person . . . *threatened to be made* a party to a proceeding" because the CEO of Reichel Foods had made a statement to police investigators in September 2021, shortly after her resignation, that he intended to sue her. *See id.*, subd. 3 (emphasis added). In support of this contention, Taylor cites evidentiary materials in her addendum. At oral argument, we questioned whether those evidentiary materials were in the district court record when the district court ruled on Taylor's motion. In a supplemental submission after oral argument, Taylor's attorney forthrightly conceded that the materials were not part of the record that was before the district court when it ruled on Taylor's motion. Thus, there is no evidence in the record that a civil proceeding was threatened before this civil case was commenced.

In sum, the district court did not err by determining that Taylor's request for advancement with respect to the civil case was not properly before the court because, when she made the request, she was neither a party nor threatened to be made a party to a civil proceeding. And even if the district court had erred in that ruling, its error would be a harmless error because Taylor would not be entitled to advancement with respect to the civil case for one of the reasons she is not entitled to advancement with respect to the criminal case: because she cannot satisfy the condition that she has "received no improper personal benefit." *See* Minn. Stat. § 302A.521, subd. 2(a)(3); *see also* Minn. R. Civ. P. 61.

Thus, the district court did not err by denying Taylor's motion for advancement with respect to this civil case.

Affirmed.